IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GWENDOLYN DASHNER and JOHN HIRKO, SR., as Co-Administrators of the Estate of John Hirko, Jr., Deceased, KRISTIN FODI, and TUAN HOANG,	)	Civil Action No. 99-CV-02124
Plaintiffs	)	
vs.	)	
JOSEPH EDWARD RIEDY, Individually, and in his Official Capacity as a Member of the Bethlehem Police Department, et al.,	)	
Defendants	)	
and	)	
THE MORNING CALL, INC.,	)	
Intervenor	)	

* * *

APPEARANCES:

JOHN P. KAROLY, JR., ESQUIRE
On behalf of Plaintiffs

STEPHEN LEDVA, JR., ESQUIRE
SUSAN R. ENGEL, ESQUIRE
On behalf of Defendants

GAYLE C. SPROUL, ESQUIRE
On behalf of Intervenor

* * *

O P I N I O N

This matter is before the court on the Motion of The Morning Call to Intervene and for Access to Court Proceedings, filed November 19, 2003. On November 26, 2003 the undersigned entered an Order granting the motion of the petitioner newspaper to intervene

and scheduled a hearing on December 9, 2003 on the motion for access to certain court records and proceedings.

The specific court proceedings which the newspaper is seeking to access is the sealed transcript of an in camera hearing held before the undersigned on October 8, 2003 during the jury trial of the within civil rights action.

For the reasons expressed below, we grant the newspaper's request in part. Accordingly, we will unseal, and make available to the public, a redacted portion of the October 8, 2003 in camera hearing.

Procedural Background

In this civil rights action, plaintiffs are seeking damages for, among other things, the use of excessive police force in conducting a search of a private residence for evidence of suspected drug trafficking.[1] The jury trial was bifurcated on the

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[1] Plaintiffs Gwendolyn Dashner and John Hirko, Sr. are the parents and Co-Administrators of the Estate of their deceased son, John Hirko, Jr. Plaintiff Kristin Fodi is John Hirko, Jr.'s former girlfriend, with whom he resided at the time of his death. Plaintiff Tuan Hoang was their landlord.

In the evening of April 23, 1997 members of the Emergency Response Team of the Bethlehem Police Department attempted to execute a search warrant at the residence of John Hirko, Jr. and Kristin Fodi, in Bethlehem, Pennsylvania. The search warrant authorized the police to search the residence for the presence of drugs, drug paraphernalia and weapons.

Two officers on the front porch broke the front window and threw a "flash/bang" distraction device into the living room in order to distract the occupants, while a group of officers at the rear of the house broke down the rear door with a battering ram and entered the premises through the kitchen.

Defendants contend that John Hirko, Jr. fired a handgun at the officers on the porch and pointed the gun at the officers in the kitchen. They contend that defendant Officer Joseph Edward Riedy on the front porch returned a burst of fire from his semi-automatic assault rifle, and that defendant Officer Todd William Repsher fired a single shot from his handgun from the kitchen. Plaintiffs contend that Mr. Hirko neither had a gun in his hand, nor pointed or fired it.

Eleven bullets, including ten from Officer Riedy's semi-automatic rifle and one possibly from Officer Repsher's handgun, entered Mr. Hirko's

(Footnote 1 continued):

issues of liability and damages. After a nearly six-month liability trial the jury reached a liability verdict on March 4, 2004. In their mixed verdict, the jury found in favor of each plaintiff on some issues, including use of excessive force, failure to supervise, and unlawful search and seizure of property; and in favor of each defendant on some issues, including use of excessive force, failure to train, and civil conspiracy.

Prior to commencement of the damages portion of the bifurcated trial, the case settled.

Motion to Intervene and for Access to Court Proceedings

As noted above, the Motion of The Morning Call to Intervene and for Access to Court Proceedings was filed November 19, 2003.

On December 8, 2003 Defendants' Response to Motion of *The Morning Call, Inc.* for Access to Court Proceedings was filed. Defendants opposed the request of the newspaper for access to the transcript.

The matter was briefed by intervenor and defendants. Plaintiffs did not file a response or brief. At the December 9, 2003 hearing on the newspaper's motion, the parties stipulated to the accuracy of a transcript of two sidebar conferences held in open

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(Continuation of footnote 1):
body, killing him. The flash/bang device started a living room sofa on fire, which in turn started the house on fire.

Kristin Fodi escaped from the fire by climbing out a second-story window and lowering herself to the ground with the aid of a group of police officers, who placed her in custody and transported her to police headquarters.

court on October 8, 2003. At those sidebars, counsel and the court discussed a defense objection on the grounds of privilege to a question propounded during the trial by plaintiffs' counsel to defendant police officer Edward James Repyneck, Jr.[2]

Counsel for intervenor and counsel for defendants each argued orally at the December 9 hearing. Counsel for plaintiffs did not argue. However, he stated that he did not object to the newspaper's request.[3] After oral argument the undersigned took the matter under advisement. Hence this Order and Opinion.

Psychotherapist-Patient Privilege

On August 18, 2003 a Motion by Police Defendants in Limine to Preclude Evidence of Post-Incident Psychological Counselling Involving Police Defendants was filed.[4] On August 28, 2003 a General Response to All Defendants' Motions in Limine, including this one, was filed.[5] On September 3, 2003 an answer specific to this motion was filed, titled Plaintiffs' Answer to Police Defendants' Motion in Limine to Preclude Evidence of Post-Incident Psychological Counseling Involving Police Defendants.[6]

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[2] The transcript of the October 8, 2003 sidebar conferences was attached as Exhibit A to The Morning Call's motion. That was the only evidence offered at the hearing.

[3] Plaintiff's counsel requested, and was granted, permission to leave the hearing during oral argument.

[4] Docket Entry 183.

[5] Docket Entry 216.

[6] Docket Entry 242.

In their motion, defendants requested an Order precluding plaintiffs from introducing any evidence concerning psychological counseling by defendants in this case. Plaintiffs intended to introduce evidence of a meeting of police officers held in Room 504 of Bethlehem City Hall a few days after the April 23, 1997 drug raid, which is the subject of this suit. Plaintiffs argued that this was an inappropriate meeting of the police officers who conducted the raid, held to concoct a favorable version of what occurred and to get their stories straight in connection with a criminal investigation of the incident being conducted by the Pennsylvania State Police.

Defendant police officers and defendant City of Bethlehem contended, on the contrary, that the meeting was a group psychological counseling session set up by defendant Bethlehem Police Commissioner Eugene Learn to help the officers deal psychologically and emotionally with what happened. Defendants contend that the counseling session was facilitated by Chief Timothy Stephens of the Fountain Hill, Pennsylvania Police Department, and that “stress officers” from other departments were brought in to serve as counselors.

Defendants contend that at this meeting the officers talked about how they felt regarding this incident. They were instructed as to what they could be expected to feel, and they were

given instructions that if they needed it, they should get additional counseling.[7]

Oral argument on defendants' motion in limine was held before the undersigned in open court on September 22, 2003. At the conclusion of oral argument, on the record, in open court, the undersigned entered the following Order:

> NOW, this 22nd day of September, 2003, upon consideration of Police Defendants' Motion in Limine to Preclude Evidence of Post-Incident Psychological Counseling Involving Police Defendants filed August 18, 2003; upon consideration of plaintiffs' answer to the motion filed September 3, 2003; upon consideration of the briefs of the parties; for the reasons articulated simultaneously on the record; and pursuant to Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996),
>
> IT IS ORDERED that defendants' motion in limine is granted.
>
> IT IS FURTHER ORDERED that plaintiffs are precluded from offering any evidence at trial that defendant officers were offered post-incident psychological counseling.
>
> IT IS FURTHER ORDERED that plaintiffs are precluded from introducing any evidence at trial regarding conversations had, and/or statements made, by defendant police officers during any psychological, psychiatric or psychotherapeutic counseling sessions.
>
> IT IS FURTHER ORDERED that plaintiffs are precluded from questioning any witness at trial concerning whether the witness received any psychotherapy. BY THE COURT:

[7] See Notes of Testimony Excerpt from the October 8, 2003 trial session at pages 3-5. This excerpt is attached as Exhibit A to The Morning Call's motion for access to court's proceedings.

Subsequent to the argument, the above Order was typed, proofread, corrected and filed on October 10, 2004.[8]

Immediately after dictating the Order, the undersigned articulated on the record, in open court, our reasons for granting defendants' motion in limine. We incorporate those reasons here.[9]

As noted in our articulation on the record, Federal Rule of Evidence 501 concerns privileges. That rule is couched in general language which authorizes the courts to determine what privileges exist under principals of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. The federal evidentiary rule does not provide specific categories of privilege, but rather leaves it up to the court to determine under common law what those privileges are.

In Jaffe v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), the Supreme Court of the United States recognized an unqualified psychotherapist-patient privilege. The Supreme Court recognized the privilege to exist under F.R.E. 501. The Supreme Court found that the psychotherapist-patient privilege is rooted in the imperative need for confidence and trust between patient and therapist.

The Court reasoned that because of the sensitive nature of the problems for which individuals consult psychotherapists,

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[8] Docket Entry 316.

[9] See Notes of Testimony ("N.T.") titled Excerpts of Hearing Before The Honorable James Knoll Gardner, United States District Court Judge", hearing held September 22, 2003, at pages 12-17.

disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

The Court recognized that the psychotherapist-patient privilege serves a public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The Supreme Court stated that the mental health of the citizenry, and no less than its physical health, is a public good of transcendent importance.

More specifically, the Court recognized the importance of a psychotherapist-patient privilege for police officers. In footnote ten of Jaffe the Supreme Court stated, "Police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities, not only confront the risk of physical harm, but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger. The entire community may suffer if police officers are not able to receive effective counseling and treatment after traumatic incidents, either because trained officers leave their profession prematurely or because those in need of treatment remain on the job."[10]

The Supreme Court at footnote 16 of its opinion defined "psychotherapists" as psychologists and medical doctors who provide mental health services. But the Court went on to point out that in

[10] Jaffe v. Redmond, 518 U.S. at 11 n.10, 116 S.Ct. at 1929 n.10, 135 L.Ed.2d at 346 n.10.

today's climate, social workers need to be included in that definition as well.

We determined that whether or not a police officer defendant in this case obtained, or requested, psychotherapy, or other similar counseling, has no relevance to any issue in this case. More importantly, we concluded that the privilege as defined and described by the Supreme Court is an absolute one. We found that the importance which the Supreme Court gave to this absolute privilege is such that it would jeopardize the privilege to permit a question concerning whether or not the witness had sought the services of a psychotherapist. In other words, we concluded that not only are the conversations between the psychotherapist and the patient privileged, but the mere seeking of the professional help by the patient is privileged as well.

We find this to be consistent with the policy behind the creation of the privilege. That policy includes, in part, the necessity for the patient to have confidence that all aspects of the treatment and the therapist-patient relationship will be confidential in order to encourage people who might need such services to seek those services, and to encourage them to be frank with the therapist.

The effect of our ruling was to preclude plaintiffs from eliciting evidence at trial that any defendant sought or received counseling, or eliciting any details of such counseling. Any disputes concerning whether a meeting of officers was a counseling

session, and thus privileged; or a police cover-up, and thus not privileged, was reserved until the time of trial.

In Camera Hearing

At the trial session of October 8, 2003, in open court, in the presence of the jury, in plaintiffs' case-in-chief, plaintiffs' counsel John P. Karoly, Jr., Esquire, called defendant Office Edward James Repyneck, Jr. as a plaintiffs' witness as of cross-examination.[11] During Attorney Karoly's questioning of Officer Repyneck, the following occurred:

> BY MR. KAROLY:
> Q. Now, sir, did you participate in subsequent meetings, debriefings, re-enactments concerning this [incident]?
>
> A. I did not. ...There was only one meeting that was held that I was present for.
>
> Q. Okay, I'm going to ask you which one that is, but I take it that you weren't present for the re-enactment?
>
> A. No, sir.
>
> Q. Did you meet with ERT members and others including a Chief Timothy Stephens of [the] Fountain Hill [, Pennsylvania Police Department]?
>
> A. Yes.
>
> Q. And did you discuss the events at 629 Christian Street?

[11] The trial transcript excerpt incorrectly refers to the witness as James Edward Repyneck, Jr. at N.T., October 8, 2003, page 2, line 3. See Exhibit A to intervenor's motion.

MR. LEDVA [Defense Counsel]: Objection, your Honor.

THE COURT: All right. Approach sidebar, please.[12]

At sidebar, out of the hearing of the jury sitting in the jury box, the undersigned heard argument on the objection. Defense counsel contended that the meeting about which plaintiffs' counsel inquired was a counseling session which the undersigned on September 22, 2003 found to be privileged and confidential. Plaintiffs' counsel contended that it was a meeting of police officers with no counselors present and that, accordingly, it was neither privileged, nor confidential.[13]

While still at sidebar, the undersigned then stated to counsel:

> THE COURT: All right, we're going to have an in camera hearing and elicit from this officer by nature of an offer of proof what he would testify concerning that meeting if permitted to do so. All right. (End of sidebar discussion.)[14]

The court then excused the jury from the courtroom, intending to conduct the in camera hearing out of the presence of the jury, in open court, in the presence of the public, not at sidebar, and on the record.

After the jury departed, the court invited plaintiffs' counsel to interrogate Officer Repyneck to elicit what his answers might be if the plaintiffs were permitted to question him in the

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[12] N.T., October 8, 2003, page 2, line 9 to page 3, line 2. See Exhibit A to intervenor's motion.

[13] N.T., October 8, 2003, page 3, line 3 to page 5, line 15.

[14] N.T., October 8, 2003, page 5, lines 16-20.

presence of the jury concerning the meeting with Chief Stephen from Fountain Hill.[15] At that point, plaintiffs' counsel asked to approach. At sidebar the following occurred:

> MR. KAROLY: I'm concerned, Judge, if that depends on what he says and how this turns out as to how it will affect my ability to question other officers. Can we make this truly in camera in which it's the witness, the Judge and the attorneys?
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> THE COURT: No, I'm not going to exclude the public from this portion of the proceedings. ...[16]

At this point four defendant police officers who had not yet testified were still in the courtroom. Because they were potential witnesses in plaintiffs' case-in-chief, as of cross-examination, and/or in defendants' case-in-chief, a discussion was held concerning whether those witnesses should be directed to leave the courtroom while Officer Repyneck was being questioned in camera. Defense counsel then requested that the in camera hearing be closed to the public because the undersigned had already ruled that the subject matter was privileged and confidential. Plaintiffs' counsel then requested that a closed in camera hearing be held in another courtroom.[17]

The undersigned then declared a ten-minute recess. The attorneys, the witness (Officer Repyneck), the undersigned, the court reporter, and a court security officer then proceeded to another courtroom on the same floor of the courthouse to conduct a

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[15] N.T., October 8, 2003, page 6, lines 4-13.

[16] N.T., October 8, 2003, page 6, lines 18-24.

[17] N.T., October 8, 2003, page 6, line 24 to page 8, line 25.

closed, in camera interrogation of Officer Repyneck by plaintiffs' counsel, and legal argument by counsel, on defendants' privilege objection to plaintiffs' question.

The hearing was held on the record, out of the presence of the jury. The doors to the courtroom were locked and the public was excluded. This was done so as not to violate the witnesses' psychotherapist-patient privilege (by asking him whether he conferred with a counselor and the contents of that communication) in the process of determining whether or not he was entitled to the privilege at that meeting of officers.

Discussion

The Morning Call has standing to intervene in this action pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 778 (3d Cir. 1994). Accordingly, as noted above, we entered an Order on November 26, 2003 permitting the newspaper to intervene.

The First Amendment extends to the press and public a qualified right of access to judicial proceedings. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); United States v. Raffoul, 826 F.2d 218, 222 (3d Cir. 1987). The public right of access to trial proceedings extends to criminal and civil cases. Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984).

The right to access criminal and civil trials extends to transcripts of sidebar and in camera proceedings that, by

definition, occur out of public earshot during civil and criminal trials. See In Re: Cendant Corporation, 260 F.3d 183, 192 (3d Cir. 2001); United States v. Smith, 787 F.2d 111, 114-115 (3d Cir. 1986).

The Third Circuit has set out specific procedures for notice to the public of closure motions during hearings and trials. Motions for closure that are made outside the public's hearing should be renewed in open court before being acted upon. Those actually present and objecting to removal should be heard before a closure order is entered. Before closing the courtroom, the court must consider alternatives to closure and state on the record its reasons for rejecting them. Raffoul, 826 F.2d at 226.

In the context of a motion to unseal the transcript of trial proceedings that have already been closed, the parties seeking the continued sealing of the transcript of the closed hearing must "demonstrate a compelling interest in keeping the transcript sealed, the absence or unworkablity of less restrictive alternatives such as redacting the transcripts, and the effectiveness of keeping the transcript sealed in furthering the compelling interest." Raffoul, 826 F.2d at 227.

In other words, four factors must be considered by the court. They are as follows:

1. Compelling Interest. A party seeking to seal court records must first demonstrate that public access is likely to harm a compelling government interest. Publicker Industries, Inc., 733 F.2d at 1071.

2. No Alternative. A party seeking to seal records must further demonstrate that no alternative to secrecy can adequately protect the threatened interest. Publicker Industries, 733 F.2d at 1072.

3. Narrow. If no adequate alternative exists, any sealing imposed must be no broader than necessary to protect the threatened interest. Richmond Newspapers, Inc., 448 U.S. at 581; and

4. Effective. A substantial probability must exist that defendant's rights would be prejudiced by publicity that closure would prevent. Press-Enterprise Company v. Superior Court, 478 U.S. 1, 14 (1986) (Press-Enterprise II).

Our evaluation of these factors is as follows. Public access to defendant Repyneck's testimony concerning his psychological counseling would harm the compelling public interest contained in the psychotherapist-patient privilege for the reasons articulated above in our discussion of Federal Rule of Evidence 501 and Jaffe v. Redmond, supra. This court stated those compelling interests on the record, in open court, at the September 22, 2003 hearing and ruling on defendants' motion in limine.[18]

No alternative to secrecy can adequately protect the threatened interest. Once the patient is forced to testify publicly that he sought psychological counseling or to state publicly the details of that counseling, he has lost his psychotherapist-patient privilege and cannot get it back. This court concluded on the record, in open court, at the September 22, 2003 hearing that no

[18] N.T., September 22, 2003, pages 12-17.

alternative to secrecy can adequately protect the threatened interest for those reasons.

Because no adequate alternative exists, the sealing of the transcript imposed must be no broader than necessary to protect the threatened interest. If certain portions of the sealed transcript deal with the seeking of counseling with a psychologist or social worker, the obtaining of such professional assistance, and/or the details of such counseling, but other parts of the sealed transcript deal with matters unrelated to the privilege, or matters relating to the privilege which are not themselves privileged, then the privileged portions of the sealed transcript must be redacted, but the remaining portions must be made available to the public. If any non-privileged materials remain sealed, the sealing would be broader than necessary to protect the threatened interest.

Accordingly, the undersigned has carefully reviewed the sealed transcript of the October 8, 2003 in camera hearing. Because a number of matters unrelated to the privilege were discussed at the closed hearing, as well as some matters relating to the privilege which were not themselves privileged, the undersigned has prepared a redacted version of the sealed transcript. This redactation eliminates those privileged matters, but makes available to the public and the press all portions of the transcript which are not privileged. This will limit the impact of the closure on the public’s right to access.

Concerning the fourth and final factor, for all the reasons discussed concerning the first two factors (Compelling Interest and No Alternative), we conclude that a substantial probability exists that Mr. Repyneck's psychotherapist-patient privilege would be destroyed and prejudiced by publicity concerning those privileged matters which closing of the hearing prevented.

While the Court had sound reasons for closing the hearing and sealing (at least part of) the transcript, as indicated above, the undersigned did not advise the public in open court (as opposed to advising counsel at sidebar) that the proceedings would be closed, nor did the undersigned provide those in the courtroom at the time with an opportunity to object and be heard before the closure Order was entered, as required by Raffoul, supra. Despite the extreme difficulty of conducting such a procedure publicly without violating the witnesses' privilege, the effort must be made to do so pursuant to Raffoul. This oversight has been cured by entertaining the newspaper's motion for access to the court proceedings, conducting a hearing, entertaining oral argument, rendering a decision granting the motion in part, and making the redacted transcript available to intervenor, albeit after the fact.

Raffoul also requires the court to consider alternatives to closure before closing the courtroom and to state on the record its reasons for rejecting them. While the undersigned considered and rejected alternatives to closure (including a public in camera hearing out of the presence of the jury, and a public in camera

hearing from which four potential witnesses would be sequestered), and while the court has stated its reasons on the record and in this Opinion for rejecting those alternatives to closure, Raffoul requires the statement of these reasons to be made before, not after, closing the courtroom. However, we believe that stating our reasons for rejecting those alternatives to closure at this time and providing a redacted transcript will, nevertheless, serve the public interest.

Conclusion

For all the foregoing reasons we grant in part the motion of intervenor for access to the sealed transcript of the October 8, 2003 in camera hearing, and we are providing the press and public with access to a redacted transcript of those proceedings by filing the redacted transcript, without impoundment, simultaneously with the filing of the within Order and Opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GWENDOLYN DASHNER and JOHN HIRKO, SR., as Co-Administrators of the Estate of John Hirko, Jr., Deceased, KRISTIN FODI, and TUAN HOANG,	)	Civil Action No. 99-CV-02124
Plaintiffs	)	
vs.	)	
JOSEPH EDWARD RIEDY, Individually, and in his Official Capacity as a Member of the Bethlehem Police Department, et al.,	)	
Defendants	)	
and	)	
THE MORNING CALL, INC.,	)	
Intervenor	)	

O R D E R

NOW, this 30th day of September, 2004, upon consideration of the Motion of The Morning Call to Intervene and for Access to Court Proceedings, filed November 19, 2003; it appearing that a motion to intervene was granted on November 26, 2003; upon consideration of Defendants' Response to Motion of *The Morning Call, Inc.* for Access to Court Proceedings, filed December 8, 2003; after hearing held December 9, 2003; after oral argument; and for the reasons contained in the accompanying Opinion,

IT IS ORDERED that the motion of The Morning Call for access to court proceedings is granted in part.

IT IS FURTHER ORDERED that, pursuant to the within Opinion, a redacted version of the in camera proceedings on October 8, 2003 concerning the testimony of defendant Edward James Repyneck, Jr. shall be filed simultaneously with the within Order and Opinion.

BY THE COURT:

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James Knoll Gardner
United States District Judge